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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. ~~109~~ 53

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON, *Petitioners*,

v.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. F. of L. and LOCAL 28 OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is not officially reported but is printed as Appendix B to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 229 F. 2d 436, and is also printed as Appendix C to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESTATEMENT OF QUESTIONS PRESENTED

We think a proper statement of the questions presented by the Petition, or necessarily involved if the judgment below is reviewed, are as follows:

1. Whether the District Court correctly held that under the Railway Labor Act it lacked jurisdiction to entertain a complaint the facts of which allege racial discrimination by a railroad not in the terms or in the making of a collective bargaining agreement but solely because of its asserted unlawful application to Petitioners;

2. Whether the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, over disputes between railroads and their employees involving the interpretation or application of agreements concerning rates of pay, rules, or working conditions, can be successfully avoided by a litigant simply through the device of not naming the railroad as a party defendant and proceeding solely against the bargaining representative, even though the facts alleged by the complaint assert wrongful application of the agreement only by the railroad, allege no violation of the agreement by the representative, and make only the claim that the representative declined to protest the action of the railroad;

3. Assuming, *arguendo*, that the District Court and not the Railroad Adjustment Board had jurisdiction over the subject matter of the complaint, whether its

judgment of dismissal was nevertheless correct because of failure of the complaint to state a claim upon which relief can be granted against the union defendants or because of lack of an indispensable party defendant.

STATUTE INVOLVED

Petitioners mistakenly refer to the applicable statute as the National Labor Relations Act instead of the Railway Labor Act, the only provision of which involved in this case is Section 3 First (i), 45 U.S.C., Section 153 First (i). This provision reads as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

RESTATEMENT OF THE CASE

Since in our view the statement of the case provided by Petitioners is inadequate to acquaint the Court with the real problem involved unless the Court itself reads and analyzes the complaint (R. 3-16)[1], we make this restatement.

[1] Record references throughout this brief are to the printed transcript of the record filed in the United States Court of Appeals for the Fifth Circuit, copies of which have been filed with this Court pursuant to Rule 21(4).

(a) The Complaint

The factual allegations of the complaint (R. 3-16), while not at all clear as to either the injuries allegedly suffered by petitioners or the specific legal rights alleged to have been invaded by respondents, may be summarized as follows:

Petitioners (plaintiffs below) are Negro employees of the Texas and New Orleans Railroad Company (herein referred to as the Railroad) and the Southern Pacific Transport Company (herein called the Transport Company) and are members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. Petitioners instituted this suit on their own behalf and allegedly as representatives of other Negro employees of the Railroad and the Transport Company similarly situated.

Respondents (defendant below) are labor organizations and officers thereof. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein called the Brotherhood) is a standard international labor organization with its headquarters and principal place of business located at Cincinnati, Ohio, and is the duly selected and legally constituted bargaining representative of certain employees of the Railroad, including petitioners. Locals 28 and 6051 are labor organizations affiliated with the Brotherhood whose membership is made up of employees of the Railroad. Pat J. Gibson is General Chairman of the Brotherhood on the Railroad and Raymond Dixon[2] is Division Chairman.

[2] Through error, petitioners have called Mr. Dixon "Dickerson" in their complaint and Petition.

Since November 1, 1939, an agreement entered into pursuant to the provisions of the Railway Labor Act (45 U.S.C. Sec. 151 et seq.) has been in effect between the Railroad and the Brotherhood governing the rates of pay, rules, and working conditions of the employees of the Railroad which the Brotherhood represents.

It is alleged that on May 1, 1954, the Railroad posted on the bulletin board at its Houston Freight House (where all petitioners were employed) a notice stating that approximately 45 jobs were being abolished. Petitioners believe, but do not allege as a fact, that only those jobs held by Negro employees were abolished. It is claimed that this notification was improper under the terms of the collective bargaining agreement. The complaint does not set forth any particular provision of the agreement on which petitioners rely, and, indeed, since the Railroad was not made a party respondent, the complaint is completely vague as to who petitioners considered was required by the agreement to give proper notice of job abolishments.

The complaint further alleges that respondents did not inform petitioners of the circumstances which caused the notice to be posted. The claim is made in general terms that respondents allowed the abolishment of the jobs to take place "without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason". (R. 11) Petitioners admit, however, that respondents did inform them that the abolishment of the jobs was due to the leasing by the Railroad to the Transport Company of certain portions of the docks at the Houston Freight House, and that nothing could be done about it. (R. 12)

It is further alleged that the jobs listed as having been abolished were not in fact abolished because persons were immediately hired by the Transport Company to perform them. The claim is made that many white men were hired to fill these jobs and that later on some Negroes, whose jobs had been abolished by the Railroad, were hired but without seniority—petitioners apparently contending that the seniority rights acquired by the Negro employees of the Railroad should have been credited to them when they were hired by the Transport Company. (R. 12)

There are other allegations to the effect that Negro employees of the Railroad have been displaced from permanent positions and placed on a so-called "Break Out" while this has not occurred to white employees, and that petitioners believe that no white employees represented by the Brotherhood have been displaced. (R. 12-13) The complaint avers that the foregoing acts "constituted a planned course of conduct designed to discriminate against them [plaintiffs] because of their race or color".[3]

[3] The complaint further alleges unlawful segregation of Negro members of the Brotherhood into a separate lodge (Local 6051), which the complaint seeks to have enjoined by the court as unlawful. Although argued below, this issue has apparently been abandoned by petitioners because it is omitted in their Petition. In any event, the short answer to the claim of illegality is that there is no allegation that any of petitioners have sought to obtain admission to the white lodge (Local 28), have ever been denied such right, have refused to join the Negro local, or have been deprived of any employment rights under the Railway Labor Act as the result of the separation of white and Negro lodges. Consequently, we took the position in the District Court that in the absence of any allegation of the deprivation of an established legal right, the claim was non-justiciable. See *Taylor* v. *Brotherhood of Railway & Steamship Clerks*, 106 F. Supp. 438.

Declaratory and injunctive relief and damages in the amount of $75,000 are sought for alleged violations of petitioners' rights under the Federal Constitution, the Railway Labor Act, and the collective bargaining agreement. Injunctions are sought to restrain respondents from refusing to bargain for petitioners on a basis equal to that afforded white employees, from refusing to protect petitioners from discriminatory action, from allowing petitioners' jobs to be abolished, and from acting as the bargaining representative until discrimination ceases and petitioners are accorded equality of representation. (R. 14-16)

The foregoing constitutes the discrimination of which petitioners complain in their Petition. It is to be noted specifically that the complaint contains no allegation whatsoever that the collective bargaining agreement between the Railroad and the Brotherhood is discriminatory or illegal in any of its provisions or that it was illegally entered into by the Brotherhood or the Railroad. It is simply alleged in general terms, without any supporting factual allegations or specifications, that respondents have applied the agreement in a discriminatory manner. Even here the complaint is completely vague as to what provisions of the agreement have been violated or what duties or obligations under it owed by respondents have been denied petitioners. Actually, the alleged discriminatory conduct would appear to be limited to a passiveness on the part of the respondents toward reduction of forces by the Railroad. No where in the complaint is it alleged that the respondents conspired with the Railroad regarding the abolishment of the 45 jobs or that the respondents took any action in the alleged deprivation of petitioners' rights.

Accordingly, insofar as the complaint even purports to state a cause of action it is limited to the claim that certain discriminatory conduct was practiced upon petitioners by the Railroad in the administration of the bargaining agreement through the abolishment of certain positions and the rehiring without proper seniority of Negroes in other jobs, which conduct the Brotherhood allowed to happen and did nothing about.

(b) Proceedings in and Action by the District Court and Court of Appeals

As its responsive pleading to the complaint, respondents filed a motion to dismiss the action (R. 17-18) upon the following grounds:

(1) that the court lacks jurisdiction over the subject matter of the action because Congress had granted to the National Railroad Adjustment Board exclusive jurisdiction of actions involving the application or interpretation of collective bargaining agreements;

(2) that the Railroad, which took the action of abolishing jobs of which petitioners complain and is a party to the bargaining agreement upon which petitioners base their rights, is an indispensable party respondent to the proceeding but has not been joined by the petitioners;

(3) that the complaint completely fails to present any justiciable issue with respect to its allegations concerning segregation under the union shop agreement; and

(4) that in many respects, as indicated in the foregoing statement concerning the allegations of the complaint, the complaint fails to state a claim upon which relief can be granted.

On March 16, 1955, the District Court filed a memorandum opinion in which it held that since the substance of the complaint was a claim that petitioners had been denied rights through alleged improper performance of a collective bargaining agreement, the court lacked jurisdiction. It specifically considered and rejected petitioners' contention that the decision of this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 193, and *Tunstall* v. *Brotherhood*, 323 U.S. 211, were applicable, and supported its conclusion by reliance upon a decision of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.* 340 U.S. 942, as well as the decision of the United States Court of Appeals for the Fifth Circuit in *Hettenbaugh* v. *Airlines Pilots Ass'n International*, 189 F. 2d 319. It further held that because of lack of jurisdiction over the subject-matter of the complaint, it was not necessary to discuss the other grounds upon which the respondents had moved to dismiss. (R. 19-24)

On March 21, 1955, the District Court entered its judgment granting the motion to dismiss (R. 24-25), from which judgment the petitioners took an appeal to the United States Court of Appeals for the Fifth Circuit (R. 26).

On January 31, 1956, in a per curiam decision (R. 31; Appendix C of Petition), the United States Court of Appeals affirmed the judgment of the District Court, 229 F. 2d 436. Petition for rehearing was denied on March 16, 1956 (R. 43) and the petition for writ of certiorari was filed on May 24, 1956.

ARGUMENT

The issues in the present case uniquely turn upon their own facts and will affect few, if any, other litigants. Contrary to the statement in the Petition (p. 7) that the question is a novel one of importance in the administration of the Railway Labor Act, this Court has already denied a petition for certiorari in a case the facts of which are substantially identical with those here involved. *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.*, 340 U.S. 942.

I.

THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND IS CLEARLY CORRECT

The District Court properly held that under the Railway Labor Act it lacked jurisdiction to entertain a complaint the facts of which allege racial discrimination by a railroad not in the terms or making of a collective bargaining agreement but solely because of its asserted unlawful application to petitioners. As indicated in the foregoing Restatement of Questions Presented, the allegations of the complaint do not concern the negotiation of a discriminatory collective bargaining agreement; the claim is that petitioners have been denied rights under an existing valid agreement by alleged improper performance or application of that agreement by the Railroad. As stated in the Petition, the racial discrimination complained of consisted of acts by the Railroad in firing petitioners summarily without notice, abolishing their jobs, hiring white employees to do many of the same jobs, and rehiring some of the negro employees but with loss of accrued seniority. There is no claim in the complaint that respondents did any of these things. The sole claim against respondents is that they allowed the Railroad

to abolish the jobs "without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason." (R. 11) It is admitted in the complaint, however, that respondents did inform petitioners that the abolishment of the jobs was due to the leasing by the Railroad to the Transport Company of certain portions of the dock at the Houston Freight office and that nothing could be done about it. (R. 12)

Consequently, the claim of unlawful conduct by respondents amounts simply to a charge that because they did not believe that a grievance presented by petitioners had merit, and therefore should not be protested by the bargaining representative to the Railroad, such passiveness by the bargaining representative constituted a violation of obligations due petitioners by respondents under the Railway Labor Act and the Federal Constitution.

It has been well settled since this Court's decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, and *Order of Railway Conductors* v. *Southern R. Co.*, 339 U.S. 255, that cases involving the interpretation or application of collective bargaining agreements are within the exclusive jurisdiction of the National Railroad Adjustment Board, and that such jurisdiction may not be invaded by either the state or federal courts. We do not understand petitioners to contest this point of law, as such, but they seek to avoid application of the doctrine in this case on the basis of this Court's decisions in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210. The *Steele* case holds that the Railway Labor Act im-

poses on the statutory representative of a craft a duty to represent, *in collective bargaining and in the making of agreements*, all employees in the craft without discrimination because of their race. The *Tunstall* case holds that the federal courts have jurisdiction to entertain a suit for the violation of such duty by the statutory representative of a craft because it is the Federal statute (the Railway Labor Act) which condemns as unlawful such conduct by the representative.

We concede that a collective bargaining representative cannot enter into an agreement with a railroad which is discriminatory with respect to Negroes in its provisions, and that if this occurs the courts have the power to correct the wrong. But, as we have pointed out above in our recitation of the allegations of the complaint, there is no allegation that the collective bargaining agreement involved in this case is discriminatory in its terms or that it was negotiated for a discriminatory purpose. On the contrary, all of the allegations are to the effect that the agreement was *applied* in a discriminatory manner.

This brings us to the crux of the difference between the contention of the petitioners and that of respondents. Petitioners maintain that it makes no difference whether the allegations of racial discrimination concern the negotiation and making of agreements or the application of such agreements. They say that the holding by the Supreme Court in the *Steele* and *Tunstall* cases covers either situation and that the federal courts have jurisdiction to redress the wrong in either event.

We maintain that the *Steele* and *Tunstall* cases do not support petitioners' position and that there are

two Circuit Court decisions which directly support our position. In fact, petitioners concede this to be the case. They take direct issue with the decision of the Court of Appeals for the Fifth Circuit in *Hettenbaugh* v. *Airline Pilots Ass'n International*, 189 F. 2d 319 (1951), and the decision of the Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.* 340 U.S. 942, upon both of which decisions the District Court relied. Petitioners say that these two cases were incorrectly decided and are in conflict with this Court's decisions in the *Steele* and *Tunstall* cases. We contend that the *Hettenbaugh* and *Hayes* cases were correctly decided and that neither decision is incompatible with this Court's decisions in the *Steele* and *Tunstall* cases.

In the *Hayes* case, a group of Negro employees alleged that the collective bargaining representative and the Railroad had violated the Railway Labor Act by administering a collective bargaining agreement so that the Negro employees were discriminatorily denied the promotions and seniority assignments to which they were entitled.[4] The Negro plaintiffs, as here, sought an injunction and other equitable relief, and the defendants moved to dismiss for lack of jurisdiction of the subject matter. In affirming the judgment of the District Court granting defendants' motion to dismiss, the Court of Appeals stated the question raised by the appeal as being whether the District Court has jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bar-

[4] For the detailed facts see the District Court's opinion, 88 F. Supp. 108 at 109.

gaining agreement (page 337). In answering this question in the negative, the court said (p. 338):

> "It is not necessary to state in detail the nature of the affidavits and of the pleadings constituting the record which the trial court had before it. These matters are fully set forth in the opinion of Chief Judge Michael J. Roche, the trial judge. D. C., 88 F. Supp. 108. We adopt his opinion. We add to it only to the extent of saying that it is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U.S.C.A. § 153; National Railroad Adjustment Board; Slocum v. D.L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U.S. 192; 65 S. Ct. 226, 89 L. Ed. 173 and Tunstall v. Brotherhood, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187. The disposition of the cause made by the District Court is correct."

It is to be noted that this Court denied certiorari in the *Hayes* case, 340 U.S. 942. Precisely the same contentions are advanced by petitioners here as were advanced to this Court by the petitioners in the *Hayes* case, including the contention that the decision of the Ninth Circuit was in conflict with this Court's decision in the *Steele* and *Tunstall* cases.

The substantive facts in the *Hayes* case are on all fours with the facts in the instant case with the exceptions, first, that here, unlike the *Hayes* case, there is no allegation that the bargaining representative acted "in connivance" with the Railroad in the alleged discriminatory practices by the Railroad; and, second, in the *Hayes* case plaintiff brought suit against the Railroad as well as the bargaining representative. Here the Railroad was not joined as a party defendant, and petitioners seek to make much of this point in their Petition. It seems to us that the short answer to this attempted distinction is that obviously the basic nature of the cause of the action cannot be changed through the tactic of omitting an indispensable party defendant.[5]

The second decision which we believe supports the judgment below is that of the United States Court of Appeals for the Fifth Circuit in *Hattenbaugh* v. *Airline Pilots Ass'n International*, 189 F. 2d 319. That case also involved charges of discriminatory conduct on the part of a bargaining representative, allegedly in violation of the Railway Labor Act. A group of pilots who had been employed during a strike by members of the defendant Association sued the bargaining representative alone to enjoin it from further representing them, for an accounting, and damages. In affirming the District Court's dismissal of the complaint for lack of jurisdiction, the Fifth Circuit said (p. 321):

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[5] Moreover, the District Court in the *Hayes* case, could well have been describing the precise facts here involved when it said (88 F. Supp. 108 at 111):

> "Simply stated, the complaint alleges only that the union has permitted, *through failure to prevent*, the existence of the alleged discriminatory practices of the Railroad."

"There is no allegation here that the bargaining agreement between the parties discriminated against the appellants. At most, there is an allegation of a breach of the bargaining agreement. Any right of action, if one exists, is based on the alleged breach of the bargaining agreement, and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. See Hayes v. Union Pac. R. Co., 9 Cir., 184 F. 2d 337.

"The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct., 577, 94 L. Ed. 795. It is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that federal courts may act. The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties. The dismissal of the cause for want of jurisdiction was correct."

Petitioners advance the further argument that in the *Steele* case this Court found that the Negro petitioners in that case had no adequate remedy before the Railroad Adjustment Board, and they quote from the decision of this Court to the effect that the Adjustment Board "has consistently declined in more than 100 cases to entertain grievance complaints by individual members of a craft represented by a labor

organization". (Pet, p. 6) The answer to such a contention here is that since this Court's admonition in the *Steele* case, the Adjustment Board now entertains grievances by individual members pursuant to the statutory right of the individual to process the grievance in person under Section 3 First (j) of the Railway Labor Act (45 U.S.C., Section 153 First (j)). A number of such cases can be cited which did not exist at the time this Court decided the *Steele* case. We think that if there is any substance to petitioners' claim that they could not pursue their statutory remedy before the Adjustment Board, that the proper time to raise it is after they have tried to do so and failed and not prematurely before the Adjustment Board has had an opportunity to entertain the grievance.

Petitioners further state that the decision in the instant case is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Dillard* v. *Chesapeake & O. Ry. Co.*, 199 F. 2d 948. The *Dillard* decision is the only one, to our knowledge, in which a court has held that it has jurisdiction of a claim by negro employees that they have received discriminatory treatment from a railroad and their collective bargaining representative in the application of a collective bargaining agreement. Unlike the complaint here, the complaint in the *Dillard* case alleged that the bargaining representative actively participated with the railroad in preventing promotion of negro employees. Aside from this factual difference in the allegations of the complaint, however, the Fourth Circuit did state that it was immaterial whether the bargaining representative asserted its power to discriminate against negro employees by

entering into a formal agreement or by improper application of an agreement. In so holding (199 F. 2d 948, 951), it also stated that it had considered the decision of the United States Court of Appeals of the Ninth Circuit in the *Hayes* case but felt that that decision was in conflict with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768.

We believe that the error in the *Dillard* case lies in a misinterpretation of this Court's holding in the *Howard* case. In the latter case the complaint alleged that the bargaining representative had entered into an agreement with a railroad for a discriminatory purpose. No such allegation is to be found in the complaint in the instant case. As we read the opinion in the *Howard* case, this Court held that a bargaining representative who acts by authority of the Railway Labor Act cannot enter into an agreement for a discriminatory purpose even though the employees affected are in a separate class for representation purposes. In reaching this conclusion, this Court carefully distinguished the case it was deciding as one involving the *validity of an agreement*, not the legality of practices under a valid agreement requiring interpretation of its provisions. This is demonstrated by the following language of the Court in the *Howard* decision (343 U.S. 768, 774):

> "Here, as in the *Steele* Case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment

> Board under our holding in Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239. *This dispute involves the validity of the contract, not its meaning.* (Italics supplied.)

We do not believe that this holding of *contract invalidity* was applicable to the situation presented in the *Dillard* case, and it is not applicable to the facts alleged by the complaint in the instant proceeding.

II.

ASSUMING, ARGUENDO, THAT THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION, THE JUDGMENT OF DISMISSAL WAS NEVERTHELESS CORRECT BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Assuming for purposes of discussion that the District Court and not the Railroad Adjustment Board had jurisdiction of the subject-matter of the complaint, the judgment of dismissal was correct for reasons urged by respondents but not passed upon by the courts below. Such additional grounds may be urged here, *Langnes* v. *Green*, 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547; *United States* v. *Ballard*, 322 U.S. 78, 88.

A. The Allegations of Wrongful Conduct by Respondents Fail to State a Claim Upon Which Relief Can Be Granted

Reduced to its essentials, the allegations of the complaint regarding the refusal of respondents to properly represent petitioners and process their grievance amount to the following:

The Railroad abolished certain jobs held by petitioners. The basis for doing so was that it had leased the docks on which these jobs were performed to its subsidiary, the Transport Company. The Transport

Company then hired its own employees to perform the jobs. Some of the employees hired were those whose jobs had been abolished. The employees affected requested the Brotherhood to handle their grievances against the Railroad. The Brotherhood declined to do so, and thus petitioners claimed that it thereby "breached the statutory duty imposed" upon it by Section 2 Fourth of the Railway Labor Act, 45 U.S.C., Section 152 Fourth, "to protect plaintiffs from any discriminations on the basis of race or color".

The only statutory duty of the bargaining representative with respect to the employment rights of individuals in the craft or class represented relates to the bargaining function—i.e., the area in which the bargaining representative is given statutory authority to negotiate and fix with the Railroad, regardless of the wishes of individual employees, the terms and conditions of employment applicable to all. See *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, with respect to the scope of this authority. The basis upon which this Court in the *Steele* and *Tunstall* cases predicated jurisdiction in the federal courts was the "statutory fiduciary duty" of the bargaining representative under the Railway Labor Act to represent in collective bargaining all those for whom it acted without hostile discrimination because of race or color. This obligation is not expressly stated in the Railway Labor Act but was implied by the Court as an essential concomitant of the bargaining representative's exclusive position under the statute and its power to fix the terms of employment of minority members of the craft without their consent. It is thus apparent that in the

Steele and *Tunstall* cases the duty of the statutory representative was predicated on, and co-extensive with, *its authority under the statute*.

There is thus no question of the statutory representative's exclusive authority and obligation with respect to bargaining for rates of pay, rules, and working conditions, but such authority and obligation does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711. In that case the Court carefully delineated the scope of the representative's statutory authority under the Railway Labor Act to bind individual employees, and it clearly held that such authority did not extend to the administration of agreements or bind individuals as to their grievances or claims of violations of the agreements, but was limited to the resolution of so-called "major disputes" involving the making of agreements with the carrier. The Court did not hold that the bargaining representative could not represent individuals with respect to their grievances—and in most cases, of course, the bargaining representative does so—but it did hold that the representative had no power to bind the individual with respect to his grievances under the agreement and that the individual had the clear right to resort in person to the Adjustment Board for redress of such grievances.

Consequently, we submit that the "fiduciary duty" concept of the *Steele* and *Tunstall* cases, which was predicated upon the existence of exclusive authority in the bargaining representative to bind the individual employee in contract negotiations with the carrier,

cannot be extended to the field of policing or administering agreements and redressing individual grievances. In short, if the authority to act does not exist, neither does the duty.

It is readily apparent that a requirement that a bargaining representative process all employee grievances would result in a chaotic situation. Should such a theory prevail, the bargaining representative would be in the hopeless position of having to handle to a conclusion, through the grievance machinery and to the Railroad Adjustment Board, each and every claim of the thousands of employees in the craft irrespective of their merit and regardless of their consistency from the point of view of interpretation of the provisions of collective bargaining agreements. The bargaining representative would find itself urging one interpretation to the Board one day and another the next, so that uniform interpretation and application of the agreement would become impossible.

Thus it is clear that there can be no such statutory duty as petitioners assert in their complaint. Accordingly, in the absence of a statutory obligation, any legally enforceable duty of the bargaining representative to process individual grievances would necessarily have to be predicated on a contract. Here no such contract is pleaded. The collective bargaining agreement between respondents and the Railroad does not embrace any such obligation. It is simply an agreement whereby the Railroad makes certain promises to the bargaining representative with respect to the rights and benefits which will be accorded to members of the craft in connection with their employment. It involves no contractual undertaking as between the bargaining representative and the employees.

The Supreme Court of Rhode Island dealt with an issue virtually identical with the one now under discussion in *Cabral* v. *Molders Union*, R.I. , 106 A. 2d 739. In that case the plaintiff brought suit for damages against his collective bargaining representative, alleging as unlawful the union's refusal to process plaintiff's grievance, as a result of which he lost his employment. In sustaining the defendant's demurrer for failure to state a cause of action, the court said (p. 741):

> "In our view the declaration itself does not set out in terms any definite promise, undertaking or agreement by defendant to act for or on behalf of plaintiff or to perform any contractual duty for him in the circumstances alleged. Further, Article VI, Section 1, of the agreement deals only with the procedure to be taken in case of grievances thereunder. Nothing in the section has been brought to our attention which requires the union to act in such matters. Also plaintiff is authorized to deal directly with the employer if he wishes. No agreement, promise, or contract on the part of the union in respect to acting for plaintiff or on his behalf appears to be contained in Article VI as supporting any contractual duty owed to him by defendant.
>
> "The matter of seniority is covered by Article IV, Section 1. No promise, agreement or contractual duty on the part of the union for plaintiff's benefit is provided for in that article. If any difficulty occurs in agreeing on that subject it is to be taken up under the grievance procedure in Article VI hereinbefore referred to. Under Article X the employer agrees that it will not discharge the employee without 'just cause' which is defined in part in that article. Likewise there is no reference in Article X to any promise, under-

taking or contractual duty entered into by the union for plaintiff's benefit.

"It would appear therefore from the declaration itself, which includes and is based on the provisions of the agreement between the employer and the union, that such provisions are largely procedural in nature under which plaintiff as an employee and member of the union acts alone, and that the union has made no promise, undertaking or agreement to act on behalf of plaintiff respecting the matters involved herein. In our opinion therefore there was no error in the ruling of the trial justice sustaining the demurrer."

The same conclusion was reached by the Supreme Court of Alabama in a case involving the same issue between a railroad employee and his bargaining representative. *International Brotherhood of Locomotive Engineers* v. *Couch*, 236 Ala. 611.

For the foregoing reason we respectfully submit that the complaint here fails to state a claim upon which relief can be granted and that, accordingly, the judgment of dismissal below was clearly correct for this additional reason.

B. Judgment of Dismissal Is Also Correct Because the Railroad Is an Indispensable Party Defendant But Was Not Joined by Petitioners

In their complaint petitioners request an interpretation of the bargaining agreement in effect between the Railroad and respondents as requiring notification to petitioners in advance of proposed job abolishments by the Railroad. The complaint further requests a construction by the court of the lease agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees.

The collective bargaining agreement in question has been in effect since November 1, 1939. The parties to the agreement are the Railroad and the Brotherhood. The agreement sets forth not only the rights of the employees of the Railroad, but also provides for certain obligations which the employees must meet as a condition of their employment with the Railroad. The allegation of the complaint that petitioners' rights under the agreement have been violated necessarily involves an interpretation of its provisions. This would not only affect the rights of all employees covered by the agreement and respondent Brotherhood, but it would also substantially affect the rights of the Railroad.

Moreover, the rights of the Railroad are very clearly involved in this litigation in connection with its lease agreement with the Transport Company under which the Railroad leases certain portions of its docks at the Houston Freight House. Obviously the Railroad would be seriously affected by any judgment that the Transport Company could or could not hire certain individuals, or declaring that the Railroad could not effectuate its lease agreement with the Transport Company by abolishing positions of persons employed by the Railroad on the leased property.

The rule is well settled in the Federal courts that a court cannot proceed to a final determination of an action in the absence of an indispensable party thereto. *State of Washington* v. *United States*, 87 F. 2d 421, 428 (9th Cir.); *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971, 973 (5th Cir.); *Nehen* v. *Harwood*, 128 F. 2d 846, 852 (9th Cir.); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 485 (7th Cir.).

Both the *State of Washington* and *Metropolis Theatre Co.* cases set forth a detailed test to be applied in all cases in which the issue of an indispensable party is presented to the court. This test, which is generally adopted by the courts, is stated by the United States Court of Appeals for the Ninth Circuit as follows, in the *State of Washington* case (87 F. 2d 421, 427-28):

> "There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. [Citing cases] From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? * * * * if any one of the four questions is answered in the negative, then the absent party is indispensable."

In applying the foregoing test to the facts in the present case, it clearly appears that questions 3 and 4 must be answered in the negative. If the court were to interpret the collective bargaining agreement as giving petitioners the right to question job abolishment by the Railroad, certainly the rights of a Railroad under the agreement would be seriously affected. Such a determination in the absence of one of the two parties to the agreement could not be said to be consistent with equity and good conscience,

Again, if it were determined by the court that even though the railroad had leased a portion of its docks to the Transport Company for its own operation, the Railroad still could not abolish the jobs of employees performing services on those docks, or that the Transport Company could hire only those individuals who had performed the work for the Railroad with the same seniority rights as they previously enjoyed, obviously such determinations would seriously affect the interests and rights of the Railroad.

Accordingly, it seems clear that in the absence of the Railroad as a party defendant the court could not proceed to a final determination of the rights asserted in the complaint involving the collective bargaining agreement and lease agreement between the Railroad and the Transport Company.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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